STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 4, 2008
v	No. 269999 Wayne Circuit Court
ANTHONY LEE BAISDEN, Defendant-Appellant.	LC No. 05-003753

Before: Schuette, P.J., and Hoekstra and Meter, JJ.

METER, J. (*dissenting*).

I dissent from the opinions of my colleagues. A jury convicted defendant of third-degree criminal sexual conduct (CSC III), MCL 750.520d(1)(b) (sexual penetration by force or coercion).[1] The jury found that defendant, a gynecologist, sexually assaulted the complainant, his patient, while she was on the examining table for an annual gynecological examination.[2] The trial court, exceeding the sentencing guidelines range of 21 to 35 months, sentenced defendant to eight to 15 years' imprisonment. I would affirm defendant's conviction but remand this case for resentencing. My primary conclusions, set forth in part II of this opinion, are that (1) medical testimony was not necessary to prove that defendant's penetration of the complainant's vagina with his penis was "medically recognized as [an] unethical or unacceptable" practice or purpose in accordance with MCL 750.520b(1)(f)(*iv*), and (2) MCL 750.520b(1)(f)(*iv*) applied in this case because there was sufficient evidence for the jury to find either that the penile penetration occurred during a medical examination, and not after it, or that defendant used his examination of the complainant's vagina in order to achieve the penile penetration.

I. Judicial Bias

Defendant first argues that a new trial is required because of judicial bias. A judge is disqualified from hearing a case if it cannot be impartial. *In re Forfeiture of $1,159,420*, 194

[1] An earlier trial of defendant ended in a hung jury.

[2] The defense alleged at trial that defendant engaged in consensual sex with the complainant after the examination.

Mich App 134, 151; 486 NW2d 326 (1992). A party who raises a claim of bias bears a heavy burden of overcoming the presumption of judicial impartiality. *Id.*

Defendant principally relies on several of the trial court's rulings in support of his claim of judicial bias. However,

> [j]udicial rulings, in and of themselves, almost never constitute a valid basis for a motion alleging bias, unless the judicial opinion displays a deep-seated favoritism or antagonism that would make fair judgment impossible and overcomes a heavy presumption of judicial impartiality. [*Gates v Gates*, 256 Mich App 420, 440; 664 NW2d 231 (2003) (citations and quotation marks omitted).]

In this case, the trial court's rulings did not reflect a deep-seated favoritism or bias.

I also find no merit to defendant's claim that the trial court violated separation of powers principles by instructing the jury on what defendant maintains was an uncharged offense. Specifically, defendant claims that the trial court erred in instructing the jury, in accordance with MCL 750.520b(1)(f)(*iv*), that unethical or unacceptable medical treatment or examinations can satisfy the force or coercion element of CSC III.

"The power to determine . . . what charge should be brought is an executive power, which vests exclusively in the prosecutor." *People v Gillis*, 474 Mich 105, 141 n 19; 712 NW2d 419 (2006). In this case, the prosecutor, not the trial court, decided to charge defendant with CSC III for engaging in sexual penetration accomplished by force and coercion. The trial court merely instructed the jury on the different methods of proving force or coercion. No separation of powers violation occurred.

II. Directed Verdict

Defendant argues that the trial court should have granted his motion for a partial directed verdict.

> In reviewing the denial of a motion for a directed verdict of acquittal, this Court reviews the evidence in a light most favorable to the prosecution in order to determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt. [*Id.* at 113 (citation and quotation marks omitted.]

In making his argument concerning the denial of a directed verdict, defendant contends, specifically, that the theory of guilt based on MCL 750.520b(1)(f)(*iv*) should not have been submitted to the jury because it was not supported by sufficient evidence.[3] This statute provides

[3] Additional theories of force or coercion were presented to the jury, but defendant does not take issue with those theories.

that "force or coercion" for purposes of CSC III[4] includes a situation in which "the actor engages in the medical treatment or examination of the victim in a manner [that is] or for purposes that are medically recognized as unethical or unacceptable." Citing *People v Thangavelu*, 96 Mich App 442; 292 NW2d 227 (1980), and *People v Capriccioso*, 207 Mich App 100; 523 NW2d 846 (1994), defendant argues that medical testimony was required for a conviction under subsection (f)(*iv*) and that the prosecutor failed to offer such testimony in the present case.

In *Thangavelu*, *supra* at 446, the complainant testified that the "defendant physician conducted a pelvic examination in the course of which he performed cunnilingus on her while she was being examined by him for lice." The defendant contended that the prosecutor improperly failed to present medical testimony that the alleged treatment was "medically recognized as unethical or unacceptable," see MCL 750.520b(1)(f)(*iv*), and that "the trial court's instructions did not provide the jury with any guidance or standard in order to determine whether the defendant's conduct was proscribed." *Thangavelu*, *supra* at 447.

The Court stated:

> Despite the requirement that the treatment or examination be medically recognized as unethical or unacceptable, the prosecution produced no medical testimony. It was argued by the prosecutor that the act of cunnilingus is so obviously unethical and unacceptable that no medical testimony need be presented to so inform the jury. While this approach disregards a strict reading of the statutory language, we could subscribe to it if the trial of this case had been limited to the act of cunnilingus. We find, however, that this defendant was deprived of a fair trial because the jury was not limited to consideration of the specific act of cunnilingus charged; rather, the jury was allowed to speculate both about the propriety of making any examination of the pubic area and about the propriety of the nature of a pelvic examination which defendant admitted performing on a date other than the date of the alleged offense. This pelvic examination included insertion of fingers into the complainant's vagina and rectum while she was on her hands and knees on the examination table. [*Id*. at 447-448.]

Despite the Court's statement that it "could subscribe" to the approach suggested by the prosecutor "if the trial of this case had been limited to the act of cunnilingus," the Court went on to state:

> While no one would argue that medical testimony is necessary to prove that cunnilingus is not acceptable and ethical medical treatment, we believe the better view is to require medical testimony in prosecuting violations under MCL 750.520b(1)(f)(*iv*). [*Thangavelu*, *supra* at 450.]

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[4] MCL 750.520d(1)(b), the CSC III statute under which defendant was charged, specifically refers to MCL 750.520b(1)(f)(*iv*).

I have three observations concerning *Thangavelu*. First, I do not agree with the Court's statement that the approach suggested by the prosecutor in that case "disregards a strict reading of the statutory language." See *id*. at 448. As noted, MCL 750.520b(1)(f)(*iv*) provides that "force or coercion" includes a situation in which "the actor engages in the medical treatment or examination of the victim in a manner [that is] or for purposes that are medically recognized as unethical or unacceptable." The statute provides that the treatment or examination must be conducted in a manner that is "medically recognized as unethical or unacceptable" or must be for purposes that are "medically recognized as unethical or unacceptable," but it does not specifically indicate that medical testimony must be provided to prove this point.

This brings me to my second point. I believe, in contrast to the statement by the *Thangavelu* majority that medical testimony is always necessary in prosecuting crimes under MCL 750.520b(1)(f)(*iv*), that some actions or purposes are so clearly inappropriate that medical testimony is not required in order to prove that the actions or purposes are "medically recognized as unethical or unacceptable." As noted by Judge Cavanagh, who dissented from the majority in *Thangavelu*:

> I cannot agree with my sister's conclusion that the trial court's instructions did not provide the jury with any guidance or standard by which they could determine whether the defendant's conduct was proscribed. The trial court clearly instructed on first-degree criminal sexual conduct . . . and clearly instructed the jury on the definition of cunnilingus. *I can conceive of no instance when cunnilingus could be medically recognized as an ethical or acceptable practice. The average lay person or juror would not need expert medical testimony to come to this same conclusion*. The meaning of the language here involved is understandable to a person of ordinary intelligence and, for this reason, I feel the jury was competent to make this determination. . . . This is not to say that medical testimony is unnecessary in most conceivable prosecutions under this section of the statute. It is only because this particular practice is readily understandable by a juror as being medically unethical or unacceptable. [*Thangavelu*, *supra* at 452-453 (Cavanagh, J., dissenting; emphasis added).]

I believe, as with the cunnilingus at issue in *Thangavelu*, that the penile penetration at issue here was clearly recognizable to the average juror as being an unethical or unacceptable medical practice. Similarly, if a doctor's purpose in treating or examining a patient were to commit penile-vaginal penetration with that patient, such a purpose would be clearly recognizable to the average juror as being an unethical or unacceptable medical purpose.

For my third observation, I note that the *Thangavelu* opinion was issued in 1980. As such, this Court is not obligated to follow it under MCR 7.215(J)(1), which states that

> [a] panel of the Court of Appeals must follow the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals as provided in this rule.

I believe that the *Thangavelu* holding that medical testimony is necessary in *all* prosecutions under MCL 750.520b(1)(f)(*iv*) defies common sense. Accordingly, I would decline to follow it and hold that penile penetration by a doctor is recognizable by an average juror as being an unethical or unacceptable medical practice or purpose such that medical testimony is not necessary to establish this point.

In *Capriccioso*, *supra* at 105, a case dealing with the constitutionality of MCL 750.520b(1)(f)(*iv*), the Court reiterated *Thangavelu*'s holding that "medical testimony is necessary to prove that a defendant's behavior during a medical examination was not acceptable or ethical." *Capriccioso* was issued after November 1, 1990. However, the *Capriccioso* Court's sole basis for making this declaration was *Thangavelu* itself. In a circumstance such as this, when the pertinent holding of a post-1990-case is based solely on the holding of a pre-1990 case that has been rejected, I do not believe that the holding of the post-1990-case must be followed under MCR 7.215(J)(1). Indeed, MCR 7.215(J)(1) states that "[a] panel of the Court of Appeals must follow the rule of law *established* by a prior published decision of the Court of Appeals issued on or after November 1, 1990" (emphasis added). As noted in *People v Phillips*, 468 Mich 583, 589; 663 NW2d 463 (2003), we enforce the unambiguous language of a court rule as it is expressed, "without further judicial construction or interpretation." "Common words must be understood to have their everyday, plain meaning." *Id*. The significant point is that *the very specific rule of law at issue in the present case was established in Thangavelu and was merely followed in Capriccioso*. I would decline to follow that rule of law, i.e., the rule of law stating that medical testimony is necessary in *all* prosecutions under MCL 750.520b(1)(f)(*iv*).[5]

I believe that the testimony in this case was sufficient to support a finding of guilt under the MCL 750.520b(1)(f)(*iv*) theory. The complainant testified that she visited defendant for a gynecological examination. She stated that defendant inserted and removed a speculum into her vagina and performed an examination with his hands. Then, while the complainant was still on the examination table and positioned for the examination, with her feet in stirrups, defendant grabbed her thighs, pressed up against her, and inserted his penis in her vagina. Viewed in the light most favorable to the prosecution, the complainant's testimony was sufficient to establish that defendant engaged in "the medical treatment or examination of the victim in a manner [that is] or for purposes that are medically recognized as unethical or unacceptable." MCL 750.520b(1)(f)(*iv*). Accordingly, the trial court properly denied defendant's motion.

Judge Hoekstra, analyzing an issue that has not even been raised by the parties on appeal, suggests that defendant's conviction was inappropriate here because the penetration did not occur under the guise of treating or examining the complainant. I do not agree with this analysis. The complainant visited defendant, a physician, for a gynecological examination. Defendant

[5] If I were to find *Capriccioso* binding under the circumstances, then I would, of course, be compelled to join in Judge Schuette's concurrence. I further note that rejecting, in the present case, the very specific rule of law at issue from *Thangavelu* does not undermine the overall holding of *Capriccioso*. See *Capriccioso*, *supra* at 102-106. That medical testimony is not required in situations involving penile penetration certainly does not mean that MCL 750.520b(1)(f)(*iv*) is unconstitutionally vague.

examined the complainant's vagina with his hands and then penetrated her vagina with his penis, while she was still on the examination table and positioned for the examination, with her feet in stirrups. Under the circumstances of this case, it is clear that the whole transaction could be considered by the jury to be an "examination" and that the jury could properly find that defendant performed this examination unethically or unacceptably or for an unethical or unacceptable purpose. It was within the province of the jury to find that defendant "engage[d] in the medical . . . examination of the victim in a manner [that is] or for purposes that are medically recognized as unethical or unacceptable." MCL 750.520b(1)(f)(*iv*); see also *People v McCullough*, 221 Mich App 253, 255; 561 NW2d 114 (1997) (explaining that statutes must be applied in accordance with their plain meaning).

Even if the whole transaction were not viewed as an "examination," it would still be reasonable for the jury to conclude that defendant used the initial examination (i.e., the examination involving a speculum, a pap smear, etc.) for the unacceptable purpose of achieving penile-vaginal penetration with the complainant. Indeed, it was through his gynecological examination that defendant got the complainant into a position whereby he could easily commit the penetration. MCL 750.520d(1)(b) proscribes sexual penetration if "[f]orce or coercion is used to accomplish [it]." "Force or coercion," again, includes a situation in which an actor "engages in the medical . . . examination of the victim . . . for purposes that are medically recognized as unethical or unacceptable." MCL 750.520b(1)(f)(*iv*). Under the plain meaning of the statutes in question, see *McCullough*, *supra* at 255, it was within the jury's province to convict defendant if it found that defendant's examination of the victim was, at least in part,[6] for a medically "unethical or unacceptable" purpose, i.e., to accomplish penile-vaginal penetration.[7]

I reject Judge Hoekstra's analysis of this issue and would conclude that the MCL 750.520b(1)(f)(*iv*) theory was properly presented to the jury.[8]

III. Jury Instructions

Defendant argues that the trial court erred in instructing the jury in several respects. This Court reviews questions of law, including questions concerning the applicability of jury instructions, de novo. *People v Perez*, 469 Mich 415, 418; 670 NW2d 655 (2003). "This Court reviews jury instructions in their entirety to determine whether there is error requiring reversal." *People v Gonzalez*, 256 Mich App 212, 225; 663 NW2d 499, disapproved of in part on other

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[6] The statute does not require that the unethical or unacceptable purpose be the *only* purpose for the examination. See MCL 750.520b(1)(f)(*iv*).

[7] Although the facts of the case as they relate to MCL 750.520b(1)(f)(*iv*) (as opposed to other theories of force or coercion) are not entirely clear, it appears that this "improper purpose" theory was used in *People v Regts*, 219 Mich App 294, 296; 555 NW2d 896 (1996). Indeed, in that case, the defendant, a psychotherapist, "manipulated therapy sessions to establish a relationship that would permit his sexual advances to be accepted without protest." *Id*. at 296.

[8] Judge Hoekstra's contention in footnote 2 of his opinion that "the facts must show that the pretense of medical necessity was used to gain consent" is clearly not supported by the plain language of the applicable statutes.

grounds 469 Mich 966 (2003). "We will not reverse a conviction if the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights." *Id*.

Defendant first argues that the trial court erred in instructing the jury in accordance with MCL 750.520b(1)(f)(*iv*) because no medical testimony was presented. I reject this allegation of error because, as discussed above, medical testimony was not necessary under the circumstances of this case. Moreover, defendant, a physician, testified, on cross-examination after the prosecutor's case-in-chief, that it is "not a medically accepted treatment to have intercourse with a patient after a pap smear . . . ."

Defendant suggests that the trial court acted as an "unsworn witness" and committed an error requiring reversal when, in reinstructing the jury, it stated that "sexual intercourse is a medically unethical or unacceptable practice." I disagree that the trial court erred, because, as noted, *defendant himself* testified that sexual intercourse was not a medically accepted treatment. Moreover, I reject defendant's cursory argument that the trial court's reinstruction somehow negated defendant's defense of consent. The jury was free to believe that the complainant consented to the intercourse; that it did not occur as part of the medical examination but was instead a separate, consensual sexual act between the two parties; and that defendant did not use the examination for the purpose of getting the complainant into a position whereby he could penetrate her but instead had sex with the complainant, in accordance with his testimony, after she had gotten out of the stirrups and then gotten back into them.

Defendant next argues that the trial court erred in failing to give the jurors a complete version of CJI2d 20.24(5), dealing with force or coercion accomplished by way of a medical examination or medical treatment. Defendant concedes that he did not raise this issue below. Accordingly, the plain error doctrine applies. *Gonzalez*, *supra* at 225. To obtain relief, defendant must demonstrate the existence of a plain error that affected his substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). Additionally, "[t]he reviewing court should reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Id*. I find no plain error that affected defendant's substantial rights. The court declined to give CJI2d 20.24(5) and instead read the statutory language. This was appropriate and certainly does not rise to the level of plain error.

IV. Evidentiary Rulings

Defendant argues that the trial court erred in two of its evidentiary rulings. This Court reviews for an abuse of discretion a trial court's decision to admit evidence. *People v McGhee*, 268 Mich App 600, 636; 709 NW2d 595 (2005).

Defendant argues that the trial court erred in allowing a nurse to testify regarding whether the medical clinic at which the crime took place had a policy in place concerning the presence of medical assistants during gynecological examinations. Defendant contends that the testimony violated MRE 407, which prohibits the introduction of subsequent remedial measures to prove culpable conduct. However, defendant did not object below on this basis. "To preserve an evidentiary issue for review, a party opposing the admission of evidence must object at trial and specify the same objection that it asserts on appeal." *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). Accordingly, the plain error doctrine applies. *People v Ackerman*, 257

Mich App 434, 446; 669 NW2d 818 (2003). No plain error is apparent. The nurse's testimony did not violate MRE 407 because she did not testify that the clinic took subsequent remedial measures. Instead, she testified that she did not know the clinic's present policy. Moreover, contrary to defendant's argument, the nurse's testimony did not lead to an inference that administrators of the clinic believed that defendant was guilty.[9]

Defendant next argues that the trial court erred by not allowing him to present certain testimony of Marvelyn Harden, an administrative assistant at the clinic. At trial, the prior trial testimony of the complainant's boyfriend was admitted into evidence. The boyfriend acknowledged that he contacted the clinic and later went there to leave his telephone number for the defense. The boyfriend further acknowledged that he later had discussions with prior defense counsel and informed her that he had information that could show that defendant did not sexually assault the complainant and that the situation was a "scam" meant to extort money from defendant. However, the boyfriend also explained that he had lied to defense counsel to "get back" at the complainant.

At defendant's first trial, Harden explained that the boyfriend contacted her after the incident, told her that he had information that could be helpful to defendant's case, and gave her his phone number to give to defense counsel. Defendant wished to present this testimony at the present trial, but the trial court disallowed it. Defendant argues that the trial court erred in not allowing Harden to testify about the boyfriend's statements because this testimony was allegedly admissible under MRE 801(d)(1), which states:

> **(d) Statements Which Are Not Hearsay.** A statement is not hearsay if—
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> (1) *Prior Statement of Witness*. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person . . . .

However, the statement at issue was not given under oath, so the above rule is inapplicable. Moreover, the statement given to Harden was an out-of-court statement, and it was offered for its truth; therefore, it constituted inadmissible hearsay. MRE 801(c); MRE 802. The trial court did not abuse its discretion in excluding it, and I reject defendant's argument in his reply brief that the trial court abused its discretion by failing to admit the statement under the catch-all hearsay exception, MRE 803(24), especially because the boyfriend's testimony itself

[9] Defendant's argument in his primary appellate brief is somewhat unclear, but he is arguably claiming that the nurse's testimony about another policy – a policy regarding whether the police should be called immediately after a reported sexual assault – was improper. However, in his reply brief, defendant states that he is *not* in fact raising an issue regarding this second policy. Accordingly, we do not address it.

revealed that he had earlier contacted the clinic and defense counsel and tried to discredit the complainant. Nor, contrary to defendant's suggestion, did the trial court's ruling deprive defendant of his ability to present a defense.

V. Ineffective Assistance of Counsel

Defendant argues that he was denied the effective assistance of counsel in several respects. Whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v Grant*, 470 Mich 477, 484; 684 NW2d 686 (2004). The court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. *Id*. The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id*. at 484-485.

Effective assistance is presumed, and the reviewing court should not evaluate an attorney's decision with the benefit of hindsight. *Id.* at 485. To demonstrate ineffective assistance, a defendant must show that: (1) his attorney's performance fell below an objective standard of reasonableness, (2) there is a reasonable probability that this performance affected the outcome of the proceedings, and (3) the proceedings were fundamentally unfair or unreliable. *Id*. at 485-486; *People v Rogers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Counsel is not required to raise futile objections. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003).

Defendant first argues that counsel was ineffective because she failed to prepare for the possibility that the prosecutor would rely on the MCL 750.520b(1)(f)(*iv*) definition of force or coercion.

The right to the effective assistance of counsel includes having prepared counsel, i.e., one who has investigated and is prepared to present all substantial defenses. See *People v Lewis*, 64 Mich App 175, 183-184; 235 NW2d 100 (1975). To establish a claim of ineffective assistance of counsel based on defense counsel's lack of preparedness, a defendant must demonstrate resulting prejudice. *People v Cabellero*, 184 Mich App 636, 640, 642; 459 NW2d 80 (1990).

At an evidentiary hearing regarding defendant's ineffective assistance claim, defendant's attorney explained that she reviewed the pertinent statutes extensively, discussed these statutes with other attorneys, and was thoroughly prepared for trial. She indicated that she reviewed the various definitions of force and coercion and understood the elements of the charge defendant was facing. While she knew it was possible that the prosecutor's theory would be based on subsection (f)(*iv*), she realized that this instruction was not given at defendant's first trial and that this type of force or coercion was not specifically charged in the information. She was taken by surprise when the trial court ruled that it would give the instruction at defendant's second trial.

Although the attorney was not prepared as thoroughly for the MCL 750.520b(1)(f)(*iv*) theory before trial as she was in other respects, she and her legal team extensively prepared for it once they learned the jury would be instructed with regard to it. The attorney explained that she conducted extensive research into the issue and prepared a brief on the issue that she submitted to the trial court. With regard to the directed verdict motion, the attorney explained that her legal team attempted to cover every area they thought was necessary with respect to the motion.

Defendant's assistant attorney agreed that the trial court surprised the defense when it ruled that it would instruct in accordance with subsection (f)(*iv*), because this theory had not been presented at the first trial.

Given all the circumstances, defendant has not established that counsel's performance fell below an objective standard of reasonableness. Counsel reasonably assumed that subsection (f)(*iv*) would not be an issue at trial, given that this theory was never suggested before the trial court's ruling. Moreover, despite limited time to respond to the surprise, counsel responded aggressively when informed of the court's intent to give an instruction concerning subsection (f)(*iv*). Counsel argued that it should not be given because of unfair surprise and argued that the instruction was inapplicable for various reasons, including that no medical testimony had been presented concerning the issue of an unethical or unacceptable medical examination. In light of these circumstances, reversal is not warranted.

Defendant additionally argues that counsel erred in having him testify, without obtaining a ruling regarding whether his testimony would be necessary in order to obtain a consent instruction. Defendant claims prejudice because the prosecutor asked him during cross-examination whether it was "a medically accepted treatment to have intercourse with a patient after a pap smear," and he was obligated to answer "no."

Defendant has not established a claim of ineffective assistance of counsel based on the fact that he testified at trial. The trial court had strongly suggested that defendant's testimony was required to make out a consent defense, and counsel reasonably could have concluded that his testimony was necessary to present that defense. Moreover, the trial court had also decided to instruct in accordance with subsection (f)(*iv*), and counsel's decision was based on that fact as well. Counsel elicited from defendant that the sexual intercourse took place after the examination was finished, not during it, as the complainant claimed. Counsel used this to argue that force or coercion under subsection (f)(*iv*) had not been established because the sexual act occurred after the examination.

The assistant attorney explained that the decision to have defendant testify was based on various factors, including the trial court's rulings on the instructions, the fact that the prior trial resulted in a hung jury, and the fact that defendant's family felt he would make a good witness.

Considering all this information, defendant has not established a claim of ineffective assistance of counsel based on the fact that he testified at trial.

Defendant next argues that counsel erred in failing to object to certain testimony of Officer Otis Combs, the officer in charge of the case. He claims that Combs's testimony was improper because he commented on and bolstered the complainant's credibility and allegedly gave expert testimony without being declared an expert by the court.

"It is generally improper for a witness to comment or provide an opinion on the credibility of another witness, since matters of credibility are to be determined by the trier of fact." *People v Smith*, 158 Mich App 220, 230; 405 NW2d 156 (1987). Here, Combs testified that the complainant's statement to him was consistent with her prior statement to Officer Shanda Starks. Combs also testified that he felt that the complainant was telling the truth during the interview, based on her conduct during the interview.

The above testimony arguably constituted improper commentary on the complainant's credibility. However, Combs was called as a witness by the prosecutor, and a criminal prosecution against defendant was pursued, so the jurors "surely understood" that Combs believed that the complainant was telling the truth, even without this testimony. *People v Dobek*, 274 Mich App 58, 71; 732 NW2d 546 (2007). Therefore, there is not a reasonable probability that, but for counsel's failure to object to the testimony, the result of the proceedings would have been different. *Rogers, supra* at 714.

Combs also testified about the behavior of rape victims on the basis of his training and experience. His testimony in this regard arguably constituted expert opinion testimony and not lay opinion testimony. *Dobek*, *supra* at 77. However, while the trial court failed to qualify Combs as an expert, Combs properly could provide the testimony at issue, given his knowledge and experience in the pertinent area; this included forensic training, seven years' experience in the sex crimes unit, and the interviewing of defendants and complainants. See, e.g. *id*. at 79. Accordingly, counsel's failure to object to Combs's testimony did not result in ineffective assistance of counsel. *Rogers, supra* at 714.

Defendant additionally argues that his attorney rendered ineffective assistance in failing to elicit certain evidence. Defendant first claims that defense counsel failed to impeach the complainant about whether she had hired a civil attorney to pursue a claim against defendant. On cross-examination, defendant's attorney asked the complainant whether she signed a retainer agreement with a civil attorney concerning the incident, and the complainant testified that she was not sure she had signed a retainer agreement and did not remember signing an agreement. At the first trial, however, the complainant admitted that she had signed a retainer agreement with a civil attorney. Contrary to defendant's suggestion, defendant's attorney did impeach the complainant with her prior inconsistent statement, by establishing that Calhoun had previously admitted signing a retainer agreement with a civil attorney. Accordingly, defendant's appellate argument is without merit.

Defendant also claims that counsel erred in failing to present evidence that the medical clinic was busy on the day of the incident, as counsel did in the first trial, because this would have substantiated the defense by showing that there were many people at the clinic who could have assisted the complainant had the CSC III really occurred. At the first trial, the complainant testified that there were others in the clinic that day and three receptionists on duty. Contrary to defendant's implication, defendant's attorney in the instant case did elicit evidence along these same lines. Counsel elicited from the complainant that there were numerous receptionists working that day, as well as people in the waiting room, and that the complainant did not complain to them or the security guard on the premises. Counsel further elicited from the complainant that she never screamed out for assistance, banged on the walls, or attempted to run out during or after the alleged assault. Defendant's claim on appeal is meritless.

Defendant also argues that counsel erred in failing to offer evidence that the complainant thought that defendant was divorced. At the first trial, the complainant testified that she and a friend, who was also defendant's patient, had discussed defendant. The complainant testified that her friend told her "that [defendant] had two little girls, that he liked to cook and that he was divorced." According to defendant, this testimony would have further supported his own testimony concerning the complainant's reaction when he mentioned a wife.

At the evidentiary hearing concerning defendant's ineffective assistance claim, counsel acknowledged that she failed to offer evidence that the complainant thought defendant was divorced, explaining:

> It must have been a point I missed. There were so many points that I did cover. You can't cover everything. After a trial is over an attorney always says I missed something. But I did extensive outlining of her testimony from the first trial. Of all the witnesses, all of their reports, everything. It's on this disc. I outlined everything.

While the information at issue would have conceivably made defendant's testimony more credible, in light of the extensive evidence presented, I cannot conclude that that, but for counsel's error in this regard, the result of the proceedings would have been different. *Rogers*, *supra* at 714.

VI. Sentencing

Defendant makes several claims regarding sentencing. He first argues that resentencing is required because the trial court erroneously departed from the sentencing guidelines range without substantial and compelling reasons for doing so. The sentencing guidelines range was 21 to 35 months, and the trial court imposed an eight-to-15-year sentence.

A court may depart from the sentencing guidelines range if it has a substantial and compelling reason to do so and states on the record the reasons for departure. MCL 769.34(3); *People v Buehler*, 477 Mich 18, 24; 727 NW2d 127 (2007). Factors meriting departure must be objective and verifiable, must keenly attract the court's attention, and must be of considerable worth. *People v Babcock*, 469 Mich 247, 257-258; 666 NW2d 231 (2003). To be objective and verifiable, a factor must be an action or occurrence "external to the minds of the judge, defendant, and others involved in making the decision, and must be capable of being confirmed." *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). A departure from the guidelines range must render the sentence proportionate to the seriousness of the defendant's conduct and his criminal history. *Babcock*, *supra* at 264.

In reviewing a departure from the sentencing guidelines range, the existence of a particular factor is a factual determination subject to review for clear error, the determination that the factor is objective and verifiable is reviewed as a matter of law, the determination that a factor or factors constituted a substantial and compelling reason for departure is reviewed for an abuse of discretion, and the amount of the departure is also reviewed for an abuse of discretion. *Babcock*, *supra* at 264-265; *Abramski*, *supra* at 74. An abuse of discretion exists when the trial court's ruling is not within the range of principled outcomes. *Babcock, supra* at 269-270.

At sentencing, the trial court stated that it was departing from the guidelines range for the following reasons:

> The conduct that the defendant engaged in was in the opinion of the court so reprehensible that the guidelines do not adequately address his conduct.

> Because [of] the testimony of the defendant that the act was consensual, exposing the victim again to another attack and forcing her to go through a trial and have her reputation subjected to scrutiny by a jury, and also taking into consideration the fact that at the time this matter was tried, the facts which came out during the course of the trial actually warranted charges that were, that should have been brought against the defendant of criminal sexual conduct first degree as opposed to third degree. And the only reason that the court denied the prosecution motion to amend the information to include criminal sexual conduct first degree was because the defendant had not been given in the court's opinion adequate notice to properly defend against those charges.
>
> But factually, every one of the elements that were necessary for criminal sexual conduct first degree were in fact established beyond a reasonable doubt in the court's opinion at the time this trial occurred. Because of that, it is the sentence of this court that Mr. Baisden be remanded to the Michigan Department of Corrections for a period of 8 years to 15 years.

After defendant objected that the court failed to give a proper basis for departing from the guidelines, the court further stated that "the only way in which consent could have been presented to the jury was based upon the perjured testimony of the defendant."

The trial court gave two reasons for departure on the written departure form: "(1) victim is victimized twice by defendant contending victim consented to sexual encounter and (2) facts of case support a conviction beyond a reasonable doubt of CSC I despite perjured testimony of defendant."

In my opinion, the trial court's statement about the complainant's being "victimized twice" did not constitute a substantial and compelling reason to depart from the sentencing guidelines because defendant was entitled to take this matter to trial.

With regard to perjury, in *People v Adams*, 430 Mich 679, 693; 425 NW2d 437 (1988), a case cited by the trial court, the Supreme Court stated:

> [W]hen the record contains a rational basis for the trial court's conclusion that the defendant's testimony amounted to wilful, material, and flagrant perjury, and that such misstatements have a logical bearing on the question of the defendant's prospects for rehabilitation, the trial court properly may consider this circumstance in imposing sentence.

In this case, while the trial court believed that defendant committed perjury, he did not relate the perjury to prospects for rehabilitation. Moreover, the *Adams* case did not involve a departure from the legislative sentencing guidelines and therefore did not involve a requirement of "objective and verifiable" factors as discussed in *Abramski*, *supra* at 74. Here, given the credibility contest between defendant and the complainant, I cannot conclude that the court's belief about perjury was "external to the mind[] of the judge . . . and . . . capable of being confirmed." *Id*. Accordingly, it was not a proper basis for departure.

Nor does the trial court's finding regarding CSC I support the departure. In *People v Purcell*, 174 Mich App 126, 130; 435 NW2d 782 (1989), this Court held that where "there is record support that a greater offense has been committed by a defendant, it may constitute an aggravating factor to be considered by the judge at sentencing without an admission of guilt by the defendant." Here, however, the trial court's comments, including its reference to the "beyond a reasonable doubt" burden of proof and the great and repeated emphasis it placed on CSC I, indicate that it improperly made an independent finding that defendant was guilty of CSC I and used that to justify the sentence. *People v Gould*, 225 Mich App 79, 89; 570 NW2d 140 (1997); *People v Zuccarini*, 172 Mich App 11, 17; 431 NW2d 446 (1988), *People v Glover*, 154 Mich App 22, 45; 397 NW2d 199 (1986), overruled on other grounds in *People v Hawthorne*, 474 Mich 174 (2006). Accordingly, the trial court erred in departing from the sentencing guidelines. I would hold that resentencing is required.[10]

Defendant next raises several issues concerning the scoring of the sentencing guidelines. He initially contends that the trial court erred in assessing ten points for offense variable (OV) 3, which addresses physical injury to a victim. See MCL 777.33. "A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). "Scoring decisions for which there is any evidence in support will be upheld." *Id.* (citation and quotation marks omitted).

A court is to assess ten points for OV 3 if "[b]odily injury requiring medical treatment occurred to a victim." MCL 777.33(1)(d). "'[R]equiring medical treatment' refers to the necessity for treatment and not the victim's success in obtaining treatment." MCL 777.33(3).

The prosecutor requested that the court assess ten points for OV 3 because the complainant had to go to a hospital and be given drugs for sexually transmitted diseases. I agree with the prosecutor. Evidence that the complainant was treated at a hospital with medication due to a sexual assault supports a conclusion that she suffered bodily injury requiring medical treatment, and therefore the court properly assessed ten points for OV 10.

Defendant next contends that the trial court improperly assessed ten points for OV 4, which addresses psychological injury to a victim. See MCL 777.34. A court should assess ten points for OV 4 if "[s]erious psychological injury requiring professional treatment occurred to a victim." MCL 777.34(1)(b). Ten points are proper "if the serious psychological injury *may* require professional treatment." MCL 777.34(2) (emphasis added). "In making this determination, the fact that treatment has not been sought is not conclusive." MCL 777.34(2).

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[10] The court's statement that "[t]he conduct that the defendant engaged in was . . . so reprehensible that the guidelines do not adequately address his conduct" was too vague to support a departure. However, I note that a court may indeed "base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range" as long as "the court finds from the facts in the court record that the characteristic has been given inadequate or disproportionate weight." *Abramski*, *supra* at 74. If this case were to be remanded for resentencing, the court could clarify its statement regarding the inadequacy of the guidelines in this case and make more specific findings.

The trial court's ten-point score was proper. The complainant stated in her victim impact statement that she continued to participate in weekly counseling as a result of the assault and that she had been in counseling since the month of the assault. She stated that she had been profoundly affected by the incident and had become fearful of the medical profession. Additionally, at sentencing, the complainant informed the trial court that, as a result of the incident, she was damaged, had been in treatment since the time defendant assaulted her, and would continue in treatment. No scoring error occurred with respect to OV 4.

Defendant also argues that the trial court erred in assessing 15 points for OV 10, dealing with exploitation of a vulnerable victim. See MCL 777.40. MCL 777.40 provides, in part:

> (1) Offense variable 10 is exploitation of a vulnerable victim. Score offense variable 10 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> (a) Predatory conduct was involved ..... 15 points
>
> (b) The offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status ..... 10 points

"'Predatory conduct' means "preoffense conduct directed at a victim for the primary purpose of victimization." MCL 777.40(3)(a).

The prosecutor argued that OV 10 should be scored at ten points because defendant abused his authority status. Defendant argued that OV 10 should be scored at zero points because the evidence established that the complainant had come to see defendant at numerous times before the incident, she made the appointment, and defendant never contacted her before or after the incident.

The trial court questioned counsel about whether predatory conduct was involved. The court noted that there was evidence at trial that defendant made attempts to influence the complainant to have a sexual encounter with him and expressed its belief that this showed that defendant engaged in predatory conduct. The prosecutor agreed that defendant's conduct could be considered predatory and that OV 10 should therefore be scored at 15 points.

In *People v Kimble*, 252 Mich App 269, 274-275; 651 NW2d 798 (2002), affirmed 470 Mich 305 (2004), this Court held that the trial court properly assessed 15 points for OV 10 where the defendant had driven around for an hour, looking for a car to steal, and followed the victim home before shooting her. The Court explained that the "[d]efendant's preoffense behavior in seeking out a victim and following this victim home for the specific purpose of committing a crime against her was clearly predatory within the meaning of the statute." *Id*. at 275

In *People v Cox*, 268 Mich App 440, 455; 709 NW2d 152 (2005), predatory conduct was involved where the defendant visited the victim at his foster home, the defendant had harbored the victim as a runaway from his foster home, and the defendant kept a large amount of pornographic material at his home, some of which the victim had viewed.

In this case, the evidence established that defendant engaged in inappropriate conduct during prior interactions with the complainant. According to the complainant, defendant had hugged her, pulled her down by her butt, and made what she believed to be inappropriate comments. Defendant also acknowledged that he offered to test out the complainant's intrauterine device. This evidence supported a finding that defendant engaged in predatory conduct and justified the 15-point score.

Citing *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), defendant lastly argues that resentencing is required because the jury did not find beyond a reasonable doubt the facts underlying the trial court's scoring of the various offense variables. However, *Blakely* has been held to apply only to determinate sentencing based on judicial fact-finding, and, therefore, not to Michigan's indeterminate sentencing scheme. *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006). In fact, the Supreme Court has recently reaffirmed its holding in *Drohan* and determined that *Blakely* also does not apply when a defendant's minimum sentence range falls within an intermediate sanction cell. *People v Harper*, 479 Mich 599, 631-632; 739 NW2d 523 (2007); *People v McCuller*, 479 Mich 672, 694-695; 739 NW2d 563 (2007). Defendant's argument is without merit.

I would affirm defendant's conviction but remand this case for resentencing.

/s/ Patrick M. Meter